(6)

Supreme Court, U.S.
FILED
JUN 14 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1061

In The

Supreme Court of the United States

October Term, 1987

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,

Petitioner,

vs.

JERRY TARKANIAN,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of Nevada

BRIEF FOR THE RESPONDENT

SAMUEL S. LIONEL, ESQ.
(Counsel of Record)
DAVID N. FREDERICK, ESQ.
MARK A. SOLOMON, ESQ.
MARC H. RUBINSTEIN, ESQ.
LIONEL SAWYER & COLLINS
1700 Valley Bank Plaza
300 South Fourth Street
Las Vegas, Nevada 89101
(702) 383-8888

Attorneys for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

56 pp

QUESTION PRESENTED

Is the National Collegiate Athletic Association ("NCAA") a state actor, where the NCAA is a joint participant in a state university's suspension of a state employee because (I) the NCAA enforces its determination that the state employee be severed from intercollegiate athletics solely through the state university; (II) the state university has delegated its power and authority over the state employee to the NCAA and is contractually obligated to suspend the state employee at the direction of the NCAA; and (III) the NCAA requires that the state university suspend the state employee to avoid additional NCAA penalties against the university which may preclude it from participating in intercollegiate athletics?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

The Relationship of the Parties 1

The NCAA Proceedings Against UNLV 5

UNLV Proceedings Against Tarkanian 15

The Litigation 18

SUMMARY OF ARGUMENT 22

ARGUMENT 24

I. THE NCAA AND THE STATE WERE JOINT PARTICIPANTS IN SUSPENDING TARKANIAN BECAUSE THE NCAA UTILIZED STATE OFFICIALS TO ENFORCE ITS DETERMINATION THAT TARKANIAN BE SUSPENDED WITHOUT DUE PROCESS OF LAW 24

II. THE NCAA AND THE STATE WERE JOINT PARTICIPANTS IN SUSPENDING TARKANIAN BECAUSE THE STATE DELEGATED ITS POWER TO DETERMINE DISCIPLINARY CONDITIONS FOR STATE EMPLOYEES TO THE NCAA, AND THE STATE WAS CONTRACTUALLY OBLIGATED TO IMPOSE THE NCAA'S DETERMINATION THAT TARKANIAN BE SUSPENDED WITHOUT DUE PROCESS OF LAW 31

TABLE OF CONTENTS–Continued

Page

III. THE NCAA AND THE STATE WERE JOINT PARTICIPANTS IN SUSPENDING TARKANIAN BECAUSE OF THE INTERDEPENDENCE AND SYMBIOTIC RELATIONSHIP BETWEEN UNLV AND THE NCAA WITH RESPECT TO SUSPENDING TARKANIAN WITHOUT DUE PROCESS OF LAW 42

CONCLUSION 46

TABLE OF AUTHORITIES

Page

CASES

Ackermann v. United States, 340 U.S. 193 (1950) 47

Adickes v. S. H. Kress & Co., 398 U.S. 144 (1970) 22, 25, 27, 41

Blum v. Yaretsky, 457 U.S. 991 (1982) 22, 23, 26, 29, 30, 32, 39, 42

Board of Regents v. Oakley, 97 Nev. 605, 637 P.2d 1199 (1981).....34

Branti v. Finkel, 445 U.S. 507 (1980) 40

Brotherhood of Railroad Trainmen v. Howard, 343 U.S. 768 (1952).....39

Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961).....24, 42, 43, 44

City of Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668 (1976).....47

Commonwealth of Pa. v. Board of Directors, 353 U.S. 230 (1957).....22

Cooper v. Aaron, 358 U.S. 1 (1958).....45

Dennis v. Sparks, 449 U.S. 24 (1980) 22, 24, 27, 28, 29, 31, 41

Evans v. Abney, 396 U.S. 435 (1970).....33

Evans v. Newton, 382 U.S. 296 (1966) . 23, 31, 32, 33, 41

Ex Parte State of Virginia, 100 U.S. 339 (1879) 32

Federated Dept. Stores, Inc. v. Moitie, 452 U.S. 394 (1981).....47

Flagg Brothers, Inc. v. Brooks, 436 U.S. 149 (1978) 23, 25, 27, 33

Gilmore v. City of Montgomery, 417 U.S. 556 (1974) 43

Griffin v. County Sch. Bd. of Prince Edward Co., 377 U.S. 218 (1964).....27

TABLE OF AUTHORITIES–Continued

Page

Griffin v. State of Maryland, 378 U.S. 130 (1964).....27

Heath v. State of Alabama, 474 U.S. 82 (1985) 47

Jackson v. Metropolitan Edison Company, 419 U.S. 345 (1974).....23, 26, 30, 31, 32, 43

Lake Country Estates, Inc. v. Tahoe Reg. Plan., 440 U.S. 391 (1979).....30

Lombard v. State of Louisiana, 373 U.S. 267 (1963) 27

Lugar v. Edmondson Oil Co., Inc., 457 U.S. 922 (1982).....22, 25, 26, 27, 28, 29, 31, 32, 35, 41

Marsh v. State of Alabama, 326 U.S. 501 (1946)... 32, 47

Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972) 23, 26, 30, 37, 40, 41, 43

NCAA v. Board of Regents of University of Oklahoma, 468 U.S. 85 (1984).....44

Nixon v. Condon, 286 U.S. 73 (1932) 23, 31, 35, 41

Nixon v. Herndon, 273 U.S. 536 (1927) 35

Norwood v. Harrison, 413 U.S. 455 (1973) 27

Peterson v. City of Greenville, S.C., 373 U.S. 244 (1963).....27

Polk County v. Dodson, 454 U.S. 312 (1981) 39, 40

Public Utilities Comm'n v. Pollak, 343 U.S. 451 (1952).....30

Regents of University of Minnesota v. NCAA 560 F.2d 352 (8th Cir. 1977), *cert. dismissed*, 434 U.S. 978 (1977).....19, 34, 35

Reitman v. Mulkey, 387 U.S. 369 (1967).....27

TABLE OF AUTHORITIES–Continued

Page

Rendell-Baker v. Kohn, 457 U.S. 830 (1982) 23, 26, 29, 30, 32, 42

Robinson v. Florida, 378 U.S. 153 (1964) 27

San Francisco Arts & Athletics v. Olympic Committee, 107 S. Ct. 2971 (1987) 23, 24, 30, 43

Shelley v. Kraemer, 334 U.S. 1 (1948) 22, 23, 25, 26, 27, 28, 31, 43

Smith v. Allwright, 321 U.S. 649 (1944) 23, 36, 37, 41

Sniadach v. Family Finance Corp., 395 U.S. 337 (1969) 27

State v. Board of Regents, 70 Nev. 144, 261 P.2d 515 (1953) 34

Steele v. Louisville & N.R. Co., 323 U.S. 192 (1944) 39

Terry v. Adams, 345 U.S. 461 (1953) 23, 31, 35, 36, 37, 41

Texaco, Inc. v. Short, 454 U.S. 516 (1982).....27

The Civil Rights Cases, 109 U.S. 3 (1883).....31

Tulsa Professional Collection Services, Inc. v. Pope, 108 S. Ct. 1340 (1988) 23, 26, 27, 28

United States v. Classic, 313 U.S. 299 (1941).....36

United States v. Price, 383 U.S. 787 (1966) 22, 29

STATUTES

Nev. Rev. Stat. § 18.005 21

Nev. Rev. Stat. § 281.370(1)..... 33, 34

Nev. Rev. Stat. § 396.320 34

18 U.S.C. § 242.....36

42 U.S.C § 1983 ..... 24, 25, 30, 36, 46

42 U.S.C. § 1988..... 21, 24

STATEMENT OF THE CASE

The Relationship of the Parties

The University of Nevada, Las Vegas ("UNLV") is a branch of the University of Nevada, a public institution of higher learning organized and existing under Article II, Section 4 of the Nevada State Constitution and laws and rules and regulations adopted pursuant thereto, and financed by the State of Nevada. ROA VI, 1475.[1] UNLV is, and at all times relevant to this action has been, a member of the National Collegiate Athletic Association ("NCAA"). Ex. 16, pg. 197.

Jerry Tarkanian is, and since July 1, 1977 has been, a tenured professional employee of UNLV with a continuing appointment as "Head Basketball Coach and Prof. of Physical Education." Ex. 1. Upon his initial appointment in 1973, the President of UNLV assured him in writing he would be offered a series of one-year contracts until he received tenure. ROA VIII, 2002-2003. Tarkanian's only services for UNLV since his initial appointment have been as men's Head Basketball Coach, a position he has held for over 30 consecutive years at various schools and colleges. ROA VIII, 1870. Tarkanian's employment agreement with UNLV provided that, if for any reason he did not continue his duties as men's Head Basketball Coach, he could remain employed at UNLV, but his yearly salary would revert to a base sum approximately

---

[1] References to material in the Joint Appendix are cited herein as "J.A. [page]." References to the Record on Appeal before the Nevada Supreme Court are cited as "ROA [volume], [page]." References to trial Exhibits are cited as "Ex. [number]." A list of the exhibits cited, and the volume and page of the trial transcript (contained in the Record on Appeal) where each exhibit was offered and admitted, is attached as an Addendum to this brief. References to documents filed in the Nevada Supreme Court and thus part of the appellate record are cited herein as "NSCR [volume], [page]." References to the Brief for the Petitioner in this Court are cited as "P. Br. [page]."

$72,000 less than his salary as men's Head Basketball Coach. Ex. 24, pp. 2-3; ROA VIII, 1876-1879, 2007-2008.[2]

The NCAA is an unincorporated association including virtually all public and private four-year colleges and universities with major intercollegiate athletic programs from every state, the District of Columbia, and Puerto Rico. Ex. 16, pp. 148-194; ROA VIII, 1896-1897; XI, 2736, 2852-2853. A college or university must be a member of the NCAA to be involved in major intercollegiate athletics in the United States; as one prominent NCAA official expressed it, the NCAA is the "only game in town." ROA X, 2736. Thus, suspension or termination of UNLV's membership in the NCAA would end UNLV's intercollegiate athletic program because UNLV has to be a member of the NCAA to be involved in major intercollegiate athletics. ROA X, 2736.

By virtue of its membership, UNLV entered into a contractual arrangement with the NCAA, under which UNLV agreed to administer its athletic programs in accordance with NCAA "legislation," which includes the NCAA Constitution and Bylaws, official interpretations thereof, executive regulations, recommended policies and enforcement procedures. J.A. 82.[3] As the NCAA has acknowledged in this case: "The

---

[2] In addition to his UNLV appointment, but contingent upon his continuing as men's Head Basketball Coach, Tarkanian has been regularly engaged in, and compensated to perform, a variety of services related to intercollegiate basketball, including appearing weekly on a local television broadcast, writing a newspaper sports column, providing program commentary for radio broadcasts of UNLV basketball games, promoting an international line of sporting products, lecturing at basketball clinics throughout the United States, conducting summer basketball camps at UNLV for children, and performing in commercial advertisements for several Las Vegas business enterprises. ROA VII, 1870-1874, 1879, 2024-2025, 2030-2031, 2056-2057, 2059-2060; Ex. 23.

[3] All of this "legislation" is contained in an annual publication known as the NCAA Manual. ROA VIII, 1924; Ex. 16. Relevant excerpts from the 1976-77 NCAA Manual (Ex. 16) are contained in the Joint Appendix. J.A. 77-110.

University . . . is bound by contract . . . to abide by NCAA enforcement penalties . . . ." NCAA Brief of Amicus Curiae filed in the Nevada Supreme Court on or about March 3, 1978 ("NCAA Amicus Curiae Brief"), pg. 19; NSCR II, 538.

> One "Purpose" stated in the NCAA Constitution is:
>
> To uphold the principle of institutional control of, and responsibility for, all intercollegiate sports in conformity with the Constitution and Bylaws of this Association.

J.A. 79. Thus, a "Principle for the Conduct of Intercollegiate Athletics" stated in the NCAA Constitution is that:

> The control and responsibility for the conduct of intercollegiate athletics shall be exercised by the institution itself . . . .

J.A. 80-81.

However, a "Fundamental Policy" specified in the NCAA Constitution is that:

> Legislation governing the conduct of intercollegiate athletic programs of member institutions shall apply to basic athletic issues such as admissions, financial aid, eligibility and recruiting; *member institutions shall be obligated to apply and enforce this legislation, and the enforcement programs of the Association shall be applied to an institution when it fails to fulfill this obligation.*

J.A. 80 (emphasis added). Consequently, the NCAA's "Official Procedure Governing the NCAA Enforcement Program (hereafter "NCAA Enforcement Program") provides that:

> All representatives of educational institutions are expected to cooperate fully with the NCAA investigative staff, Committee on Infractions and Council to further the objectives of the Association and its enforcement program. *The enforcement procedures are an essential part of the intercollegiate athletic program of each member institution* and require full and complete disclosure by all institutional representatives of any relevant information requested by the NCAA investigative staff, Committee on Infractions or Council during the course of an inquiry.

J.A. 97 (emphasis added).[4]

Thus, by becoming a member of the NCAA, UNLV made the NCAA's standards and procedures for disciplining state employees its own, and accepted the NCAA's investigation, determination, and disposition of alleged violations of NCAA legislation by UNLV employees and others in place of its own resolution of these issues. ROA X, 2587, 2592, 2631.

Among the penalties the NCAA may assess against a member institution violating NCAA legislation is an order requiring the institution to show cause why additional penalties – including suspension or termination of its NCAA membership – should not be imposed if, in the opinion of the NCAA Committee on Infractions or the NCAA Council, the institution does not take "appropriate disciplinary or corrective action" against persons connected with intercollegiate athletics. J.A. 104-105; ROA X, 2603. The NCAA Enforcement Program provides that:

> The nature and extent of such action shall be the determination of the institution after due notice and hearing to the individuals concerned, but the determination of whether or not the action is appropriate in the fulfillment of NCAA policies and principles, and its resulting effect

---

[4] The NCAA delegates primary responsibility for administering its enforcement program to the NCAA Committee on Infractions. J.A. 97-110. At all times material to this case, the Committee on Infractions consisted of one representative from each of the following five member institutions, four of which are state institutions: University of Northern Colorado, University of Texas, University of Washington, Wake Forest University, and the University of Kentucky. ROA VII, 1918, 1923, 2779. If a member institution is dissatisfied with a decision of the Committee on Infractions, it may appeal to the NCAA Council. J.A. 101. The NCAA Council is the governing body of the NCAA between its annual conventions; among other things, the NCAA Council appoints the members of the Committee on Infractions and hears appeals from that body. ROA VIII, 1921-1922. At all times material to this case, the NCAA Council consisted of representatives from sixteen member institutions, eleven of which are public institutions, plus the NCAA President and Secretary-Treasurer as ex-officio members. See Ex. 16, pp. 130-131, listing the sixteen members of the council.

> on any institutional penalty, shall be solely that of the Committee (or Council).

J.A. 105.

Thus, in fact, the NCAA prescribes what disciplinary or corrective action the institution must take against the individual. J.A. 105; Ex. 17, pg. 10; ROA XI, 2850-2851. After giving the individual "due notice and hearing," the institution is required to execute the NCAA-mandated sanction against the individual, or thereafter persuade the NCAA that some good reason not to do so was developed at the institution's hearing that is wholly unrelated to the merits of the findings made and sanctions directed by the NCAA. ROA VIII, 1861; NCAA's Reply Brief on Cross-Appeal, filed in the Nevada Supreme Court on or about January 21, 1986, pp. 1-2 n.l; NSCR II, 444. The NCAA Enforcement Program specifies that: "Determinations of fact and violations arrived at . . . by the Committee, or by the Council on appeal, shall be final, binding and conclusive, and shall not be subject to further review by the Council or any other authority." J.A. 101.

The NCAA Proceedings Against UNLV

On February 25, 1976, the NCAA issued an "Official Inquiry" to UNLV, consisting of a cover letter and an enclosure listing numerous alleged violations of NCAA legislation from 1970 to February 1976, including allegations pertaining to the UNLV men's basketball program under Tarkanian, some of which named Tarkanian as being involved in the alleged violations. Ex. D; ROA VIII, 1988, 2142. The cover letter advised UNLV that:

> The enforcement program of the NCAA is a cooperative undertaking involving individual member institutions and allied conferences working together through the NCAA – a unified effort designed to improve the administration of intercollegiate athletics.

Ex. D. The letter asked the President of UNLV for his "cooperation and assistance to the end that complete information related to this matter may be developed," (Ex. D, pg. 3) and advised UNLV to fully investigate the allegations and submit an official response containing UNLV's position on each allegation and all data on which its position was based to the

Committee on Infractions and the NCAA investigative staff.[5] The letter stated the Committee would then meet to consider UNLV's response, UNLV representatives could appear before the Committee, and specifically requested that six UNLV employees appear, including Tarkanian. Ex. D.

UNLV enlisted its attorney, the Nevada Attorney General, to investigate all alleged violations, including those purportedly involving Tarkanian. ROA VIII, 2142-2143.[6]

After repeated inquiries by the Nevada Attorney General concerning the procedures UNLV was expected to follow (Ex. 2; ROA VIII, 2144, 2153-2156), the NCAA's Assistant Executive Director finally responded by letter dated June 2, 1976. Ex. 2, pp. 8-14. That letter informed UNLV that: (1) UNLV must seek out and submit to the NCAA prior to the Committee hearing all available information relating to the allegations, but the NCAA would not reveal to UNLV any information provided by individuals interviewed by the NCAA investigative staff prior to the hearing;[7] (2) UNLV and

---

5 As noted, the NCAA Committee on Infractions and Council adjudicate NCAA allegations against member institutions. However, the Committee meets only six or seven times a year. ROA VIII, 1923, 2079. It has no office staff or files of its own. ROA VIII, 1969-1970; X, 2716. Thus, the Committee is dependent upon the NCAA investigative staff, which is composed of permanent employees of the NCAA administration under the supervision of the NCAA Executive Director. ROA VIII, 2033-2036, 2065. The staff arranges meetings; answers procedural questions; prepares minutes, reports and correspondence for the Committee on Infractions; reviews, investigates and develops information regarding alleged violations of NCAA legislation; and otherwise coordinates and processes infraction cases from beginning to end. ROA VII, 1964, 2064, 2087, 2121; IX, 2401-2404, 2443-2444; X, 2573-2575; XI, 2740-2741; Ex. 2; Ex. 16, pg. 117.

6 UNLV also retained private counsel to assist the Attorney General. ROA VIII, 2151-2152; IX, 2220, 2283.

7 The NCAA Bylaws, Article Seven, Section 5(c)(l), provide that "[a] member under investigation [s]hall be given notice of any specific charges against it, and the facts upon which such charges are based. . . ." J.A. 94. However, the NCAA Chairman of the Committee on Infractions,

(Continued on following page)

the Committee would be informed at the hearing as to the identity of the source of information upon which each allegation was based, and any details or evidence reported by persons interviewed by the NCAA staff;[8] (3) only individuals officially representing UNLV, not individuals representing only UNLV personnel, could be present at the hearing;[9] (4) only witnesses requested by the Committee could appear at the hearing, and the Committee would be reluctant to permit witnesses suggested by UNLV except under extremely unusual circumstances;[10] (5) UNLV's representatives could

---

(Continued from previous page)

its Assistant Executive Director in charge of the Enforcement Division, and its chief staff investigator all testified that this was *not* done in this case despite UNLV's request that the NCAA do so. ROA XI, 2744, 2750; X, 2518-2519, 2668.

8 The NCAA Enforcement Program provides that: "The exact procedure to be followed in the conduct of the hearing will be determined by the Committee." J.A. 100. During the UNLV hearings, the NCAA Assistant Executive Director in charge of the Enforcement Division claimed that the NCAA investigators were acting in conformity with written policies and procedures of the Committee that were available to member institutions upon request. ROA IX, 2348-2349. However, efforts by UNLV over many months to obtain a copy of these procedures (Ex. 2, pg. 20; ROA IX, 2285-2289) were unsuccessful because these policies and procedures were buried within Committee minutes, being *ad hoc* Committee determinations made during prior investigations and hearings in other cases. ROA IX, 2289, 2476; X, 2506, 2683, 2688-2689; Ex. 2, pp. 23-24.

9 Five days before the hearing, UNLV received a letter from the NCAA reversing this position and allowing any current UNLV employee identified in an allegation to have legal counsel at the hearing. ROA VIII, 1896; X, 2682. By that time, however, Tarkanian's private counsel had made other commitments based on the NCAA's original position; consequently, Tarkanian was forced to appear during the first day of the Committee hearing without counsel. ROA VIII, 1896, 1898; Ex. 19.

10 The NCAA Bylaws, Article Seven, Section 5(c)(2), provide that "[a] member under investigation . . . [s]hall be given an opportunity to

(Continued on following page)

"debate" information presented at the hearing, but the hearing was institutional in nature in that the Committee would determine whether UNLV had violated NCAA legislation and if so, the action to be taken against UNLV;[11] (6) no transcript of the hearing would be made, only a tape recording, and UNLV representatives could listen to the tape recording but not make a verbatim transcript thereof.[12] Ex. 2, pp. 8-14.

Finally, the NCAA Assistant Executive Director observed that, "the responsibility of the University is to objectively, rather than defensively, investigate the allegations to determine the facts, regardless of the results," and continued:

> The enforcement procedures of the NCAA are administrative rather than legal procedures. In accordance with these procedures, the University should not practice a defense in investigating the allegations and preparing a

(Continued from previous page)

appear before the Committee on Infractions (or Council upon appeal) to answer such charges *by the production of evidence*." J.A. 94 (emphasis added).

[11] Despite this position, the NCAA has repeatedly relied upon the Committee hearings as satisfying its due process obligations to Tarkanian in this litigation. *See, e.g.*, NCAA Amicus Curiae Brief, pp. 26-31; NSCR II, 538; NCAA Answering Brief and Opening Brief on Cross Appeal filed in the Nevada Supreme Court on or about July 15, 1985 ("NCAA Answering Brief"), pp. 30-40; NSCR I, 36.

[12] Thus, UNLV's request to have a court reporter transcribe the Committee hearing was denied; a Deputy Nevada Attorney General and UNLV's private counsel travelled to NCAA headquarters in Kansas to listen to the tape recordings of the hearings made and administered solely by the NCAA staff. ROA VIII, 2092-2093; IX, 2306-2307; Ex. 2, pg. 12; Ex. 29. However, UNLV was not allowed to duplicate or transcribe the tape recordings, and NCAA staff baby-sat the Deputy Attorney General and UNLV's private counsel to insure they did not do so. ROA VIII, 2093; IX, 2307, 2354. The transcripts of the Committee hearings that now exist – Ex. 31(a), Ex. 31(b), and Ex. 31(c) – were prepared by NCAA staff and NCAA counsel in this case, for purposes of this litigation. ROA VIII, 2093-2095.

> response to the NCAA official inquiry. It should investigate in the most objective manner possible all allegations for purposes of determining the truth, regardless of the results or the implication to the institution in terms of subsequent real or imagined disciplinary action. The basis for this statement is that the NCAA membership in Convention assembled has adopted the Association's Constitution, Bylaws and Enforcement Procedures, placing upon themselves the responsibility of complying with and enforcing NCAA legislation.
>
> Accordingly, the 'burden of proof' is shared jointly by both the NCAA enforcement staff and the institution. It is not a prosecutor-defense legal proceeding; rather, it is a cooperative administrative effort which, when implemented, is designed to place the responsibility for determining the facts on the shoulders of both the institution and the enforcement staff in an effort to assist the Committee on Infractions in arriving at appropriate judgments. It is obvious that the member institution desires to comply with NCAA legislation when it voluntarily joins the Association and it therefore is inherent throughout the enforcement procedures that the institution make every effort to determine whether it is complying by objectively investigating any allegations which have been filed with it. In short, the institution must also assume the 'burden of proof.'

Ex. 2, pp. 13-14.

On October 27, 1976, UNLV submitted its official response to the NCAA. Ex. 2, pg. 19; ROA VIII, 2164; IX, 2175, 2295. That response included two file boxes containing affidavits, sworn statements or depositions, and documentary evidence supporting UNLV's denial of the allegations it denied. ROA VIII, 2103; XI, 2748; IX, 2333.[13] With respect

[13] Between February and October 1976, the Nevada Attorney General caused his Chief Deputy and another Deputy to devote substantially all of their time, as well as that of their entire investigative and secretarial staffs, to investigating the allegations contained in the NCAA Official Inquiry. ROA VIII, 2143-2144, 2148-2150. The same individuals continued to work full time until December 1976, and about a quarter of their

(Continued on following page)

to the allegations purporting to involve Tarkanian, absolutely no information came to the attention of the Nevada Attorney General or UNLV's private counsel indicating that Tarkanian had committed any violation. ROA VIII, 2170; IX, 2341-2343; Ex. 3. On the contrary, all the evidence coming to the attention of the Attorney General and UNLV's private counsel indicated Tarkanian was completely innocent of all allegations. ROA VIII, 2170; IX 2343; Ex. 3.

UNLV's hearing before the Committee on Infractions took place on November 14, 1976 and December 13 and 14, 1976. Ex. 22, pp. 3-10. The NCAA investigative staff's presentation on each allegation involving Tarkanian consisted solely of having one of three NCAA staff investigators orally relate his recollection of conversations he (or some other staff investigator no longer with the NCAA) purportedly had with other individuals concerning their knowledge of facts or hearsay relating to the alleged violations. ROA VIII, 2089, 2167; IX, 2480; Ex. 3; Ex. 31(a); Ex. 31(b). The NCAA staff investigators were not sworn, and they presented no statements, affidavits or depositions from any of the individuals they purportedly interviewed, nor did they present any documentary or physical evidence of any kind. ROA VIII, 2089-2090.[14]

(Continued from previous page)

time thereafter until August 1977, on the same subject. ROA VIII, 2148-2150. UNLV's private counsel spent approximately 1000 hours investigating the alleged violations and representing UNLV before the Committee on Infractions and Council. ROA IX, 2283.

[14] Apart from UNLV's official response, the only items before these investigators during their presentations were memoranda prepared by them (or by former investigators) concerning their interviews with the purported sources of information for the allegations. ROA VIII, 2090. These memoranda were dictated subsequent to the interviews, sometimes without the benefit of any notes. ROA VIII, 2090-2091. Where notes had been made, they were destroyed prior to the hearing. ROA VIII, 2101. The purported interviewees never had an opportunity to see the memoranda or review the information contained therein for accuracy. ROA VIII, 2101-2102. Neither UNLV, its legal counsel, Tarkanian, or his legal

(Continued on following page)

At the hearing, UNLV presented the sworn statements of the persons identified in the allegations involving Tarkanian; the NCAA investigators then reported that they had spoken previously with the same persons, and that those persons had given them contrary information. ROA IX, 2211. Thus, as the Chairman of the NCAA Committee on Infractions observed, with respect to the allegations charging violations by Tarkanian, in every material instance the information presented by way of the hearsay recollections of the NCAA investigators to support the allegations was in direct conflict with the sworn affidavits, statements and depositions obtained by the Nevada Attorney General's Office from the same sources. ROA XI, 2751-2752.[15]

(Continued from previous page)

counsel were ever allowed to see or obtain copies of these memoranda despite repeated requests to do so prior to and at the hearing. ROA VIII, 2091-2167; Ex. 2, pp. 4, 19.

[15] At the hearing, the NCAA investigators selectively presented purported information in support of the allegations, while failing to relate information contrary to the allegations that had come to their attention until questioned by UNLV. ROA IX, 2298-2299; Ex. 2, pp. 13-14. After the December sessions, UNLV obtained additional information clearly demonstrating that NCAA investigators had provided false and misleading information to the Committee on central issues relating to allegations against Tarkanian. ROA IX, 2302, 2311-2312, 2321-2322. This information included a tape recording made by an interviewee of his interview with an NCAA investigator. ROA VIII, 2312; Ex. 3, pp. 31-34; Ex. 26; ROA IX, 2276. The recording unequivocally demonstrated that at the hearing, a NCAA investigator attempted to discredit the sworn statements obtained by UNLV and the objectivity of its investigation by falsely attributing to the interviewee statements he had not made. ROA X, pp. 2544-2552, 2562; Ex. 26, Ex. 28. UNLV then asked that the Committee conduct a special hearing at which UNLV could question the NCAA staff on these issues. ROA IX, 2302-2303, 2311-2312, 2318-2322; Ex. 14. At that hearing, held on March 13, 1977, the NCAA investigators claimed they had the right to misrepresent the true facts concerning their sources of information because of an unwritten and/or unpublished Committee policy regarding confidential sources. ROA IX, 2323; Ex. 31(c), pp.

(Continued on following page)

The NCAA refused to allow either UNLV or Tarkanian to present as witnesses anyone not then officially representing UNLV. Ex. 2, pg. 10; ROA VIII, 1934, 2164. Thus, the NCAA prohibited UNLV from producing at the hearing the persons supposedly making these conflicting statements to resolve the conflict between the NCAA investigators' hearsay recollections and the persons' own sworn statements. The Committee did not invite these interviewees to appear because it "would cost too much," and without any apparent reason, the Committee never attempted to resolve conflicting information attributed to the same person by calling him or her by telephone. ROA VIII, 1939.

As a result of this "cooperative undertaking," this "unified effort," this supposedly non-adversarial investigation by the NCAA and the Nevada Attorney General's Office, the allegations against UNLV involving Tarkanian were supported by nothing more than the unsubstantiated hearsay recollections of three NCAA investigators, while the evidence against these allegations consisted of sworn affidavits, statements, depositions and documentary evidence from the principals involved and others wholly controverting the charges. See Ex. 3. Nevertheless, the NCAA Committee on Infractions found against UNLV on 38 allegations, 10 of which involved Tarkanian, including two charging him with dishonest, immoral or illegal conduct. J.A. 122-205.[16] Thus, the only

---

(Continued from previous page)

50-54, 57, 67. The Committee sustained this position. Ex. 31(c), pp. 50-54, 56, 59. When Tarkanian's counsel attempted to question the NCAA staff about these issues, staff asserted a claim of confidentiality, and the Committee upheld this claim and prevented further questioning on the very lines of inquiry for which the hearing had been granted. ROA IX, 2326-2327, 2330. The Committee made no investigation of its own into these matters. ROA XI, 2764-2765, 2767.

[16] Another well-known and still-active collegiate coach, admitting he was afraid to oppose the NCAA, testified below and before a Congressional subcommittee that one NCAA investigator admitted the NCAA was going to get Tarkanian and drive him out of coaching. Ex. 27; ROA VIII, 1900-1901; IX, 2234-2235, 2242-2243, 2245, 2253; XI, 2705. The trial

(Continued on following page)

substantive basis for any disciplinary action against Tarkanian was the unsubstantiated statements of three NCAA investigators accepted and adopted by the NCAA Committee on Infractions without any supporting evidence whatsoever.

The NCAA staff then drafted a so-called "Confidential Report," setting forth findings for each allegation, and penalties to be imposed upon UNLV and Tarkanian. Ex. 17; ROA VIII, 2121, 2123; IX, 2481, 2491; X, 2523-2525, 2529. The penalties against UNLV included two years' probation, during which its basketball team could not participate in post-season championships or appear on television. J.A. 178-179. The Committee requested UNLV to show cause why additional penalties should not be imposed upon UNLV if it did not "take appropriate disciplinary and corrective action with regard to" certain individuals, including:

> Head basketball coach Jerry Tarkanian which, in the Committee's present view, should be complete severance of any and all relations Tarkanian may have, formally or informally, with the University's intercollegiate athletic program during the period of the University's probation including, but not limited to, activities associated with administration, supervision, coaching, recruiting, athletic

---

(Continued from previous page)

court found that a second NCAA investigator "entertained actual bias and prejudice against" Tarkanian. J.A. 20. However, the members of the Committee on Infractions having previously developed great trust and confidence in the NCAA staff members, afforded great weight to their presentations at the UNLV hearings as a result, and two Committee members testified this confidence was a determinative reason why findings were made against UNLV and Tarkanian despite sworn statements directly conflicting with the investigators' statements. ROA VIII 1949, 1951, 1952, 1954-1956; XI, 2756-2757, 2785-2786, 2791, 2797, 2798, 2800. In addition, at least one NCAA Committee member frankly admitted he had made up his mind against UNLV before any hearings took place because of UNLV's attacks upon the NCAA staff. ROA XI, 2785-2786, 2799-2800. Consequently, as the trial judge concluded: "This case presents a classic example of how misperception becomes suspicion, which in turn becomes hostility, which leads, inevitably to a deprivation of one's rights." J.A. 28.

booster groups and public relations or fund-raising activities related to the University's athletic program.

J.A. 180-181.

Under NCAA Bylaw 4-6-(d)(2), no other NCAA member could enter its team in a NCAA-sponsored event or tournament if it hired Tarkanian to coach its team during his two-year severance from the UNLV athletic program. Ex. 16, pg. 61. Furthermore, Policy 6, Section 4 of the NCAA "Recommended Policies and Practices for Intercollegiate Athletics" provides that:

> Prior to a person's possible employment as a member of the department of intercollegiate athletics, a member institution should give careful consideration to whether he previously has been involved in violations of NCAA legislation.

Ex. 16, pg. 113. Thus, the Committee's actions created a permanent as well as a temporary impediment to Tarkanian gaining employment in intercollegiate athletics.[17]

UNLV appealed certain findings and penalties, including all findings and penalties involving Tarkanian, to the NCAA Council. Ex. 22, pg. 14; ROA IX, pp. 2352, 2496. The Council did not have before it either a transcript or a tape recording of the Committee hearings, or any evidentiary documents or witnesses, except with respect to one allegation as to which another principal named therein had submitted affidavits and other documents controverting the allegation. ROA VIII, 2129; X, 2608-2610. However, the NCAA staff prepared and submitted to the Council its expanded Confidential Report No. 123 (47), adding commentary to each finding and the proposed penalties. J.A. 122-204. The NCAA staff informed UNLV and counsel for Tarkanian that Tarkanian and

---

[17] Prior to a NCAA news release publicizing the NCAA's findings, Tarkanian had received and accepted offers to conduct (for compensation) several basketball coaching clinics in Colorado, New Mexico, Missouri and California, as a result of his success as UNLV's head basketball coach. Ex. 11; Ex. [illegible]; ROA VIII, 1872, 1880, 1893. As a direct result of the NCAA's action against Tarkanian and UNLV and the publicity attendant thereto, all such agreements were cancelled by the sponsors thereof. Ex. 12, Ex. 21; ROA VIII, 1881-1883, 1894.

his personal counsel would be permitted to appear and make a presentation to the Council. Ex. 22, pg. 15; Ex. 2, pg. 25.

UNLV submitted a Memorandum restating each appealed infraction and summarizing the NCAA staff's "evidence" on the left and UNLV's contrary evidence on the right. Ex. 3; ROA IX, 2333. This Memorandum concluded by saying, in part:

> The University believes that the imposition of a two-year suspension of head basketball coach Jerry Tarkanian, in light of the content, quality and weight of evidence presented, would constitute irresponsible and arbitrary action by the University.
>
> * * *
>
> . . . [A]fter four years of intensive investigation of the basketball program under Tarkanian, the enforcement staff was not able to present a single piece of documented evidence to support their allegations.

Ex. 3, pg. 42.

UNLV's appeal was heard by the Council on August 22, 1977. Ex. 22, pg. 15. After presentations had been made, UNLV representatives and NCAA Committee and staff representatives left to allow deliberations to begin. ROA VIII, 1899-1900, 2047. During deliberations, the Council recalled the three NCAA investigators for questioning because of the serious concerns of a number of Council members about the staff's investigation. ROA VIII, 2129-2131; X, 2594-2595, 2618-2619; XI, 2851-2852, 2854-2856. This session occurred without notice to, the knowledge or presence of, or participation by UNLV, Tarkanian, or their counsel. ROA VIII, 2130; X, 2618; XI, 2851-2852. Unlike the presentation session, not even a tape recording of this so-called "deliberation" session was made. ROA VIII, 2131; XI, 2848.

The Council affirmed the Committee's findings and penalties *en masse*. Ex. 22, pg. 17.

UNLV Proceedings Against Tarkanian

The NCAA's Confidential Report advised UNLV that:

> When such penalties and corrective actions as are determined by the Council become effective, the University should take every precaution to insure that the terms of the penalties and corrective actions are observed. Further, the Committee on Infractions intends to monitor the penalties and corrective actions during their effective periods, and any action contrary to their terms shall be considered grounds for extending their provisions and the University's probationary period.

J.A. 183. However, the Confidential Report also directed UNLV's attention to that portion of the 1976-77 NCAA Manual obligating the institution to provide "due notice and hearing" to an individual before taking any disciplinary or corrective action against him. J.A. 182.

Consequently, on September 6, 1977, pursuant to written notice, UNLV conducted a hearing to determine "appropriate disciplinary or corrective action" to be taken against Tarkanian as required by the NCAA. Ex. 3; Ex. 8; ROA IX, 2377; XI, 2941. The NCAA has expressly recognized that:

> The hearing granted plaintiff [Tarkanian] by the University [UNLV] was in fact the hearing required by the . . . NCAA Enforcement Procedure. . . . The hearing afforded plaintiff by the University must therefore be viewed as a part of the entire NCAA proceedings of which it was a part, and not as a single, isolated proceeding between the University and its employee.

NCAA Amicus Curiae Brief, pp. 26-27; NSCR II, 538. Thus, the UNLV hearing was "conducted pursuant to and as a supplement to the . . . NCAA proceedings . . . ." *Id.*, pg. 33.

The sole presentation on behalf of UNLV at this hearing consisted of UNLV's counsel reading and questioning Tarkanian about the findings involving Tarkanian in the NCAA's Confidential Report. Ex. 8; ROA IX, 2377, 2382; XI, 2953. Thus, the NCAA has characterized the evidence against Tarkanian at the hearing as "vicarious" of that before the NCAA Committee on Infractions. NCAA Answering Brief, pg. 51; NSCR I, 36.

By memorandum dated September 6, 1977, the UNLV hearing officer presiding at this hearing presented his findings and recommendation to the President of UNLV. J.A. 71-76. The hearing officer found that "[t]he factual basis for the NCAA's charges and sanctions as they apply to Coach Tarkanian is clearly in doubt" (J.A. 72), but concluded that UNLV was contractually compelled to adopt and implement the findings and penalty specified in the NCAA Expanded Confidential Report:

> [UNLV's counsel] argues persuasively that by joining the NCAA we delegated to that organization the establishment of governing standards and their enforcement as well. We are allowed and encouraged to make our own investigations but this is in no way a substitute for the investigative functions of the NCAA itself. We must live by our commitments to the NCAA, its standards and its machinery. We must accept their findings of fact as in some way superior to our own and, if we do not like the way the NCAA works, our remedy is to work for reform within the organization. In this instance we could wish for standards and due process and evidence far superior to that which we have observed, but given the terms of our adherence to the NCAA we cannot substitute – biased as we must be – our own judgment on the credibility of witnesses for that of the infractions committee and the Council.

J.A. 74-75; ROA XI, 2950, 2955. The Hearing Officer then identified UNLV's alternatives as follows:

1. Reject the sanction requiring us to disassociate Coach Tarkanian from the athletic program and take the risk of still heavier sanctions, e.g., possible extra years of probation.
2. Recognize the University's delegation to the NCAA of the power to act as ultimate arbiter of these matters, thus reassigning Mr. Tarkanian from his present position – though tenured and without adequate notice – even while believing that the NCAA was wrong.
3. Pull out of the NCAA completely on the grounds that you will not execute what you hold to be their unjust judgments.

J.A. 76. The Hearing Officer recommended that the President of UNLV adopt the second alternative and "execute the proposed sanctions of the NCAA as they apply to Coach Tarkanian." J.A. 76.

By letter dated September 7, 1977, the President of UNLV notified Tarkanian of his acceptance of the Hearing Officer's recommendation, commenting that UNLV's "dilemma" was "well set out in the decision" and "it would be impossible for the University to show cause why additional penalty should not be imposed if the University fails to take the action dictated by the Committee, and the University is simply left without alternatives." J.A. 69. The NCAA-mandated suspension of Tarkanian was made effective September 9, 1977 at 5:00 P.M. J.A. 69-70. The NCAA has acknowledged that UNLV "acted under compulsion" in suspending Tarkanian, while claiming that "[i]f Tarkanian has any legitimate complaint, it is against the NCAA and not his University." NCAA Amicus Curiae Brief, pp. 32, 33; NSCR II, 538.

The Litigation

On September 8, 1977, Tarkanian filed suit against UNLV in the Eighth Judicial District Court of the State of Nevada seeking declaratory and injunctive relief against his suspension. ROA I, 1-20. UNLV answered, denying the material allegations of Tarkanian's complaint and asserting as an affirmative defense that UNLV was "a mere extension of the NCAA" and that as a result, Tarkanian had been afforded due process through not only the University's hearing, but also the prior NCAA proceedings. ROA I, 90-96. After trial, Judgment was entered declaring that Tarkanian's Fourteenth Amendment rights had been violated and enjoining UNLV and its representatives "and all persons in active concert or participation with them" from suspending Tarkanian or taking any other action against him based on the NCAA Confidential Report. ROA II, 339-340. UNLV appealed this Judgment to the Nevada Supreme Court. ROA II, 566.

The NCAA then filed what it styled an "amicus curiae" brief in the Nevada Supreme Court arguing that no actual controversy was presented and alternatively that the NCAA "was an indispensable party" because the injunction had "the effect of invalidating NCAA proceedings and preventing their enforcement." NCAA Amicus Curiae Brief, pg. 19; NSCR II, 538. The Nevada Supreme Court rejected the NCAA's no actual controversy argument, saying:

> In the instant case, it is clear that the purpose of the university's suspension of Tarkanian was to carry out the mandate of the NCAA, and not merely to create a cause of action for litigation. There is no evidence whatever to suggest that had the university prevailed it would then have reinstated Tarkanian, in defiance of what it had determined were its contractual obligations to the NCAA and in the face of prospective sanctions by the NCAA.

J.A. 9.

However, the Nevada Supreme Court reversed the Judgment on the grounds the NCAA was a necessary party on the question of suspending Tarkanian. The Court found that, "[a]s a member of the NCAA, UNLV contractually agrees to administer its athletic program in accordance with NCAA legislation." J.A. 3. The Court then concluded that allowing the litigation to proceed without the NCAA might impair the NCAA's ability to protect its interests, specifically its claim of "a contractual right to bind the university to enforce the NCAA's decision by sanctions it deems appropriate." J.A. 11-12. The Court cited "the factual background" of *Regents of University of Minnesota v. NCAA*, 560 F.2d 352 (8th Cir.), *cert. dism'd*, 434 U.S. 978 (1977), noting the NCAA's position there "that it could not 'permit an individual institution to retain either interpretive or enforcement authority' over NCAA legislation. *Id.* at 360." J.A. 12 (footnote omitted).[18]

---

[18] In holding the NCAA to be a necessary party, the Nevada Supreme Court also found that:

(Continued on following page)

After remand, the NCAA was added as a party defendant. No damages were sought against the NCAA. Following trial, the District Court concluded that the actions of the NCAA as well as UNLV constituted state action, and that the NCAA and UNLV had deprived Tarkanian of procedural and substantive due process which would result in immediate and irreparable harm from the loss of both liberty and property interests if the suspension were not enjoined. J.A. 26-27. The District Court then permanently enjoined UNLV and its representatives, and any persons or entity acting in concert or participation with them, from suspending Tarkanian or enforcing any provisions of the Confidential Report, and enjoined the NCAA and any persons acting in concert with it from taking further proceedings against UNLV or compelling UNLV to comply with the Confidential Report, and ordered the NCAA to take no action against UNLV with respect to the Confidential Report. J.A. 33-35. Subsequently, the District Court also

---

(Continued from previous page)

> In this case, the controversy presented involves the NCAA directly, and cannot be completely and justly determined in its absence. The NCAA initiated and controlled the proceedings against UNLV which led to Tarkanian's suspension. The NCAA made the factual findings upon which Tarkanian's suspension was based. To consider the case as if it involved solely the relationship of the university and Tarkanian, or begin with the university's notification to Tarkanian of its intent to hold a hearing regarding his proposed suspension, would require the plaintiff to forego constitutional claims to which he may well be entitled.
>
> . . . It is clear that the meaningful factual determinations in this case, as well as the decision as to the penalty to be imposed, had been made by the NCAA *before* Tarkanian was afforded a hearing by UNLV. A Court of equity, in particular, should not be foreclosed from recognizing this reality, and affording plaintiff the relief to which it may entitle him.

J.A. 13 (emphasis in original).

awarded Tarkanian his costs and attorneys fees pursuant to Nev. Rev. Stat. § 18.005 *et seq.* and 42 U.S.C. § 1988. J.A. 36-43.

The NCAA appealed to the Nevada Supreme Court; UNLV did not appeal. Thus the injunction prohibiting UNLV from suspending Tarkanian is final and not before this Court. The Nevada Supreme Court affirmed the trial court's conclusions with respect to state action, due process violations, and deprivation of liberty and property interests. J.A. 45-58. However, the Nevada Supreme Court reduced the attorneys fees awarded to Tarkanian by excluding fees for the phase of the litigation in which he sued only UNLV, on the ground he did not prevail in that phase, and striking fees not supported by the evidence. J.A. 58-60. The Court also limited the injunction so as "only to prohibit enforcement of the penalties imposed upon Tarkanian in Confidential Report No. 123(47) and UNLV's adoption of those penalties." J.A. 61.

The NCAA petitioned this Court for a Writ of Certiorari, claiming five questions were presented, the first being:

> 1. Whether the action of the NCAA in directing one of its members, a state university, to show cause why it should not temporarily suspend an employee from his duties relating to intercollegiate athletics for violating the Association's rules, constitutes state action, where the member university, in compliance with NCAA rules, suspends the coach from coaching.

NCAA's Petition for Writ of Certiorari to the Supreme Court of the State of Nevada, pg. I.

By order entered February 22, 1988, this Court granted the petition, limited to Question 1 presented by the petition. Thus, there is now no question that Tarkanian has been deprived of both procedural and substantive due process, that "the decision by NCAA was arbitrary and capricious, and the decision of UNLV was vicariously so," and that UNLV was properly enjoined from suspending Tarkanian to prevent him from suffering immediate and irreparable harm from the loss of both liberty and property interests. J.A. 26-27. The only question here is whether the NCAA is a state actor.

SUMMARY OF ARGUMENT

This Court has long recognized that the Fourteenth Amendment establishes equal protection and due process requirements that only protect individuals against "such action as may fairly be said to be that of the States," not "merely private conduct, however discriminatory or wrongful." *Blum v. Yaretsky*, 457 U.S. 991, 1003 (1982), quoting *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948). Contemporaneously, however, this Court has also recognized that, where private parties join with State officials or utilize the overt official involvement of the State to violate the Fourteenth Amendment rights of others, the private parties become state actors, subject to liability under 42 U.S.C. § 1983. *Dennis v. Sparks*, 449 U.S. 24, 27-29 (1980); *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 152 (1970); *United States v. Price*, 383 U.S. 787, 794 and n.7 (1966). *See Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982); *Shelley v. Kraemer, supra.*

Here, there is no question there was state action – UNLV, a state university, not the NCAA, suspended Tarkanian. *See Commonwealth of Pa. v. Board of Directors*, 353 U.S. 230 (1957); NCAA Answering Brief, pg. 8; NSCR I, 36. However, from beginning to end, the NCAA has been a joint participant in the State's suspension of Tarkanian, utilizing (1) the overt official involvement of state officials, (2) the State's delegation of its power and authority over state employees to the NCAA, together with the State's contractual obligation to impose the NCAA's directives, and (3) the interdependence of the NCAA and the State in disciplining state employees connected with intercollegiate athletics, to deprive Tarkanian of liberty and property interests without due process of law.

First, the NCAA made itself a joint participant by making use of the overt official involvement of state officials to enforce its "private" determination that Tarkanian be suspended. *Lugar v. Edmondson Oil Co., Inc., supra; Dennis v.*

Sparks, supra; Shelley v. Kraemer, supra. The NCAA did not simply exercise purely private rights authorized by state law without the overt official involvement of state officials. *See Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149 (1978). Here, the involvement of state officials was not only significant, substantial and pervasive, it was *essential* to the NCAA enforcing its "private" directive that Tarkanian be suspended, since the NCAA enforces its directives only through its member institutions. *Compare, Tulsa Professional Collection Services v. Pope*, 108 S. Ct. 1340 (1988). And here, the decision being challenged is the State's decision to suspend Tarkanian; consequently, the issue here is the NCAA's joint participation in the State's action, not whether there is a sufficient "nexus" between the State and the action of a private party to make the private party's action state action, though such "nexus" does exist. *Compare, San Francisco Arts & Athletics v. Olympic Committee*, 107 S. Ct. 2971 (1987); *Blum v. Yaretsky*, 457 U.S. 991 (1982); *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982); *Jackson v. Metropolitan Edison Company*, 419 U.S. 345 (1974); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972).

Second, the NCAA was a joint participant in setting the standards and procedures and making the determinations imposed by the State in suspending Tarkanian. By contract, the State delegated a right, power or privilege that is traditionally the exclusive prerogative of the State – the power to determine disciplinary conditions for state employees – to the NCAA. *See Evans v. Newton*, 382 U.S. 296 (1966); *Smith v. Allwright*, 321 U.S. 649 (1944); *Nixon v. Condon*, 286 U.S. 73 (1932). The State then imposed the NCAA's "private" standards, procedures and determinations against Tarkanian, under the State's statutory and common law authority, power and responsibility for disciplining state employees, because of the State's contractual obligation to the NCAA to do so. *See Moose Lodge No. 107 v. Irvis, supra*, 407 U.S. at 177-179; *Terry v. Adams*, 345 U.S. 461 (1953). UNLV and the NCAA thereby became joint participants in the State's suspension of Tarkanian.

Finally, the NCAA was a joint participant in suspending Tarkanian because of the interdependence of the NCAA and the State on this question, creating a symbiotic relationship between them with respect to suspending Tarkanian. *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961); *cf. San Francisco Arts & Athletics v. Olympic Committee, supra*, 107 S. Ct. at 2987, 2991-2993 (1987) (concurring and dissenting opinions). UNLV is wholly dependent upon the NCAA for its ability to engage in intercollegiate athletics; it must impose the NCAA's "private" directive that Tarkanian be suspended to avoid additional penalties against itself, including the risk of being prohibited from engaging in intercollegiate athletics. Conversely, the NCAA can enforce its directives against persons connected with intercollegiate athletics only through its member institutions; thus, the NCAA is wholly dependent upon UNLV to enforce its "private" directive that Tarkanian be suspended. This total interdependence on the question of suspending Tarkanian creates a symbiotic relationship making the NCAA a joint participant in state action. *Burton v. Wilmington Parking Authority, supra.*

For each of these reasons, separately as well as in combination, the NCAA is a state actor and thus properly subject to 42 U.S.C. § 1983 and 42 U.S.C. § 1988.

ARGUMENT

I. THE NCAA AND THE STATE WERE JOINT PARTICIPANTS IN SUSPENDING TARKANIAN BECAUSE THE NCAA UTILIZED STATE OFFICIALS TO ENFORCE ITS DETERMINATION THAT TARKANIAN BE SUSPENDED WITHOUT DUE PROCESS OF LAW.

In *Dennis v. Sparks, supra*, private parties made a corrupt agreement with a state court judge causing the judge to deprive the plaintiff of property without due process of law. This Court unanimously held that the private parties were subject to suit under 42 U.S.C. § 1983, observing (per Justice White) that:

> . . . to act 'under color of' state law for § 1983 purposes does not require that the defendant be an officer of the State. It is enough that he is a willful participant in joint action with the State or its agents. Private persons, jointly engaged with state officials in the challenged action, are acting 'under color' of law for purposes of § 1983 actions.

449 U.S. at 27-28. *See Lugar v. Edmondson Oil Co., supra; Shelley v. Kraemer, supra.*[19]

Thus, in *Lugar v. Edmondson Oil Co., Inc., supra*, this Court held that private parties had become state actors by utilizing state officials to obtain a prejudgment attachment allegedly depriving the debtor of property without due process of law, without even considering the motives of the private parties. In so holding, this Court distinguished its earlier decision in *Flagg Brothers Inc. v. Brooks*, 436 U.S. 149 (1978), where this Court had held that a private party's use of a state statutory scheme allowing the private party to sell stored goods at a private sale to satisfy a warehouseman's lien did not amount to state action. 457 U.S. at 938-939. The distinguishing factor is the presence or absence of the "overt official involvement" of the State in the enforcement of private rights. *Lugar*, 457 U.S. at 927 n.6; *Flagg Brothers*, 436 U.S. at 157.[20]

---

[19] In *Lugar*, this Court reaffirmed its earlier holding in *Adickes v. S.H. Kress & Co., supra*, that a private party's joint participation with a state official in a Fourteenth Amendment violation constitutes both "state action" under the Fourteenth Amendment and action "under color of law" for 42 U.S.C. § 1983. 457 U.S. at 931. Specifically, this Court concluded that: "If the challenged conduct . . . constitutes state action as delimited by our prior decisions, then that conduct was also action under color of state law and will support a suit under § 1983." 457 U.S. at 935 (footnote omitted). The NCAA assumes this to be true. P. Br. 20 n.2.

[20] The NCAA centers its state action analysis upon the criteria enunciated in *Lugar*. P. Br. 17-18, 24-26, 33, 34. This is also one of the criteria employed by the Nevada Supreme Court in finding the NCAA to be a state actor (J.A. 50-52) and as demonstrated below, *Lugar* does support this result. However, *Lugar* is expressly limited to "the particular context

(Continued on following page)

As noted, *Lugar* is "limited to the particular context of prejudgment attachment." 457 U.S. at 939 n.21. However, the State enforcement of private rights principle it applies is at least as old as *Shelley v. Kraemer, supra* and as modern as *Tulsa Professional Collection Services, Inc. v. Pope, supra*.[21]

(Continued from previous page)

of prejudgment attachment," 457 U.S. at 939 n.21, and as the cases cited in this brief demonstrate – and the cases decided with *Lugar* confirm – state action is *not* determined solely by the specific criteria enunciated in *Lugar*. For example, in *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982), decided with *Lugar*, this Court characterized the "ultimate issue" as whether the challenged action was "fairly attributable to the State," citing *Lugar*, but decided that issue without reference to the specific criteria enunciated in *Lugar*, and noted that "the acts of a private party are fairly attributable to the state on certain occasions when the private party acted in concert with state actors." 457 U.S. at 838 n.6. Similarly, in *Blum v. Yaretsky*, 457 U.S. 991 (1982), also decided with *Lugar*, this Court viewed the question as whether a private party's "conduct has sufficiently received the imprimatur of the State so as to make it 'state' action for purposes of the Fourteenth Amendment", 457 U.S. at 1003, and again decided that question without reference to the specific criteria enunciated in *Lugar*, noting that such an "imprimatur" arises "when it can be said that the State is *responsible* for the specific conduct of which the plaintiff complains," 457 U.S. at 1004 (emphasis in original), such as "if the private entity has exercised powers that are 'traditionally the exclusive prerogative of the State.' " 457 U.S. at 1005, quoting *Jackson v. Metropolitan Edison Co., supra*, 419 U.S. at 353. All of these factors are present here.

[21] Curiously, the NCAA claims that *Shelley v. Kraemer, supra*, exemplifies "cases where a private party was the vehicle for carrying out a policy firmly associated with the state" because there "a racially restrictive covenant forbidding the transfer of a white homeowner's land to nonwhites was held to be an unconstitutional denial of equal protection." P. Br. 22. As to both assertions, the *opposite* is true. The Court held that private voluntary adherence to racially restrictive covenants is *not* prohibited by the Fourteenth Amendment; however, judicial enforcement of such covenants by state officials acting in their official capacities *is* prohibited state action. 334 U.S. at 13-20. *See Moose Lodge No. 107 v. Irvis, supra*, 407 U.S. at 172, 178-179.

The "overt official involvement" may be legislative, *Peterson v. City of Greenville, S.C.*, 373 U.S. 244 (1963), executive, *Lombard v. State of Louisiana*, 373 U.S. 267 (1963), administrative, *Robinson v. Florida*, 378 U.S. 153 (1964), or judicial, *Shelley v. Kraemer, supra*. It applies to economic deprivations without due process, *Tulsa Professional Collection Services, Inc. v. Pope, supra*; *Lugar v. Edmondson Oil Co., Inc., supra*, as well as to invidious discriminations denying equal protection, *Adickes v. S.H. Kress & Co., supra*; *Shelley v. Kraemer, supra*. It applies to "overt official involvement" that is facially neutral, *Lugar v. Edmondson Oil Co., Inc., supra; Reitman v. Mulkey*, 387 U.S. 369 (1967), as well as to involvement that is blatantly discriminatory or wrongful, *Dennis v. Sparks, supra; Peterson v. City of Greenville, S.C., supra*, and it applies whether the impetus for the wrongful conduct originates with the State, *Norwood v. Harrison*, 413 U.S. 455 (1973); *Griffin v. County Sch. Bd. of Prince Edward Co.*, 377 U.S. 218 (1964), or with the private party, *Dennis v. Sparks, supra*; *Griffin v. State of Maryland*, 378 U.S. 130 (1964).

Most recently, in *Tulsa Professional Collection Services v. Pope, supra*, this Court held that an executrix's use of a state nonclaim statute utilizing inadequate notice to deprive an estate creditor of due process would violate the Fourteenth Amendment. The Court (per Justice O'Connor) observed that:

> Private use of state sanctioned private remedies or procedures does not rise to the level of state action. *See, e.g., Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978). . . . But when private parties make use of state procedures with the overt, significant assistance of state officials, state action may be found. *See, e.g., Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982); *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969).

108 S. Ct. at 1345. The Court then distinguished the nonclaim statute before it from a "self-executing" statute of limitations found not to give rise to state action implicating due process in *Texaco, Inc. v. Short*, 454 U.S. 516 (1982), on the ground that, under a "self-executing" statute, the State "has no role to play beyond enactment of the limitations period." 108 S. Ct. at 1345. Under the nonclaim statute however, there was

significant, substantial and pervasive state action because the probate court "is intimately involved throughout, and without that involvement the time bar is never activated." *Id.*[22]

Here, the State's involvement is not merely significant, substantial, and pervasive, it is *essential* to enforcement of the NCAA's determination and directive that Tarkanian be suspended. The NCAA admits it "did not and could not suspend Tarkanian" directly. P. Br. 18. Thus, the NCAA *must* utilize state officials to discipline state employees connected with intercollegiate athletics. That utilization makes the NCAA a joint participant in state action. *Tulsa Professional Collection Services v. Pope, supra*; *Lugar v. Edmondson Oil Co., Inc., supra*; *Dennis v. Sparks, supra*; *Shelley v. Kraemer, supra*.

Faced with this comprehensive, current and cogent body of law, the NCAA tries to ignore its impact entirely by a deft slight of hand. Instead of focusing upon the NCAA's joint participation with UNLV in suspending Tarkanian, the NCAA erroneously characterizes the decision below as based on "public function" and "nexus" standards. P. Br. 34.[23] The

---

[22] Justice Rehnquist dissented in *Pope*, finding the probate court's involvement "trivial" and "entirely of an administrative nature." 108 S. Ct. at 1349. Thus he could not concur in a decision in which "[v]irtually meaningless state involvement, or lack of it, rather than the effect of the statute in question on the rights of the party whose claim is cut off, is held dispositive." *Id.* For him, to distinguish the statute from a "self-executing" statute not giving rise to state action should require "a judicial or other determination that *itself* extinguishes the claimant's rights." *Id.* (emphasis in original). Here, no such criticism can be made, since it is the involvement of the State itself in carrying out the NCAA's directive – UNLV's suspension of Tarkanian – that deprives Tarkanian of liberty and property interests without due process of law.

[23] The NCAA is simply wrong in thus characterizing the decision below. The Nevada Supreme Court begins its state action analysis by noting that early lower-court decisions had found that the NCAA engaged in state action because its member institutions "were either public or government supported." J.A. 48-49. The Court then disposes of the NCAA's argument that this Court's 1982 trilogy of decisions, Lugar,

(Continued on following page)

NCAA then attempts to summarily dispose of the entire joint participation doctrine in a single footnote, claiming that joint action is either the same as the Court's "nexus" analysis or was limited in *Lugar* to prejudgment attachment cases. P. Br. 34-35 n.14. However, *Lugar* only limits the Court's *holding* in that case to prejudgment attachment cases, 457 U.S. at 939 n.21, and Justice White's opinion for a unanimous Court in *Dennis v. Sparks, supra* – not referenced in his opinion for the Court in *Lugar* decided less than two years later – amply demonstrates that *Lugar* was not intended to limit the joint participation *doctrine* to prejudgment attachment cases.

On the contrary, the NCAA's assertion ignores entirely the vast body of law summarized above, in which this Court has implicitly or explicitly recognized state action resulting from the State's overt official involvement in enforcing private action. *See also, United States v. Price*, 383 U.S. 787,

---

(Continued from previous page)

Rendell-Baker, and *Blum*, and subsequent lower-court decisions "require a different result," by discussing each of these decisions in detail and distinguishing the subsequent lower-court cases as involving private schools and/or not involving state employees. J.A. 49-52. Specifically, the Nevada Supreme Court notes that both *Blum* and *Rendell-Baker* recognize state action where a private entity exercises "powers that are 'traditionally the exclusive prerogative of the state,' " and that "the right to discipline public employees is traditionally the exclusive prerogative of the State." J.A. 51. The Nevada Supreme Court then concludes that the two-part test in *Lugar* is also satisfied. The first prong is satisfied because "no third party could impose disciplinary sanctions upon a state university employee unless the third party received the right or privilege from the university." J.A. 52. Consequently, the right or privilege *must* have come from the State, since it could have no other source. The second prong is satisfied because, "[b]y delegating authority to the NCAA over athletic personnel decisions and by imposing the NCAA sanctions against Tarkanian, UNLV acted jointly with the NCAA." J.A. 52. Thus, the Nevada Supreme Court's decision is based on the NCAA's exercise of a power that is traditionally the exclusive prerogative of the State and UNLV's joint action with the NCAA in suspending Tarkanian, *not* the NCAA's performance of a "public function" or any "nexus" between the State and the NCAA's actions against Tarkanian.

794 and n.7 (1966). And this joint participation doctrine centers upon the private party's joint participation with the State in the State's action that is being challenged; thus it differs fundamentally from this Court's "nexus" decisions in which it is the private party's action that is being challenged and the question is whether there is a sufficient "nexus" between the State and the private party's action to make the private party's action state action.[24]

Thus in *San Francisco Arts & Athletics*, *Blum*, *Rendell-Baker*, *Jackson*, and *Moose Lodge No. 107*, the plaintiffs challenged the actions of private parties, *not* the actions of the State, and the question was whether there was a sufficient "nexus" between the State and the "challenged action" to make the private party's action state action. *See Jackson v.*

---

[24] However, the Court's "nexus" requirements are also satisfied in this case. The NCAA's actions against Tarkanian were taken by its Committee on Infractions, four of the five members of which were representatives of state universities and its Council, eleven of the sixteen members of which were representatives of public institutions. In *Lake Country Estates, Inc. v. Tahoe Reg. Plan.*, 440 U.S. 391 (1979), this Court recognized that actions taken by representatives of different states acting in concert still constitute actions taken under color of state law for purposes of the Fourteenth Amendment and 42 U.S.C. § 1983, even though private representatives are also involved, 440 U.S. at 401 n.20, and the entity through which the actions are taken is not entitled to Eleventh Amendment immunity. 440 U.S. at 399-402. Furthermore, given the NCAA's reliance on its member institutions to enforce its directives, there would be no reason for the NCAA to take action against Tarkanian if UNLV had not delegated its power to determine the conditions under which Tarkanian could be disciplined to the NCAA, as well as contractually agreed to enforce the NCAA's directives with respect to UNLV employees connected with intercollegiate athletics. This delegation of State power and contractual agreement to enforce the NCAA actions in question here create the requisite "nexus" between the State and the NCAA's actions against Tarkanian. *Compare Moose Lodge No. 107 v. Irvis*, *supra*, 407 U.S. at 177-179, and *Public Utilities Comm'n v. Pollak*, 343 U.S. 451 (1952), with *Blum v. Yaretsky*, *supra*, and *Jackson v. Metropolitan Edison Company*, *supra*.

Metropolitan Edison Company, *supra*, 419 U.S. at 351.[25] Here, there is no question there was state action – UNLV, not the NCAA, suspended Tarkanian. Thus here, one *starts* with state action and, given the NCAA's use of both the "overt official involvement" of State officials and the State's statutory and common-law power, authority and responsibility over State employees to enforce its "private" determination and directive that Tarkanian be suspended, there also is no real question that the NCAA was a joint participant in the state action suspending Tarkanian, and thus a state actor. *Lugar v. Edmondson Oil Co.*, *supra*; *Dennis v. Sparks*, *supra*; *Shelley v. Kraemer*, *supra*.

II. THE NCAA AND THE STATE WERE JOINT PARTICIPANTS IN SUSPENDING TARKANIAN BECAUSE THE STATE DELEGATED ITS POWER TO DETERMINE DISCIPLINARY CONDITIONS FOR STATE EMPLOYEES TO THE NCAA, AND THE STATE WAS CONTRACTUALLY OBLIGATED TO IMPOSE THE NCAA'S DETERMINATION THAT TARKANIAN BE SUSPENDED WITHOUT DUE PROCESS OF LAW.

As the NCAA notes, "this Court originally applied constitutional restraints to government actors only." P. Br. 21. However, over one hundred years ago, in *The Civil Rights Cases*, 109 U.S. 3 (1883), this Court recognized that state

---

[25] Notably, however, in *Jackson* this Court observed that: "We have, of course, found state action present in the exercise by a private entity of powers traditionally exclusively reserved to the State. [Citations, including *Nixon v. Condon*, *supra*; *Terry v. Adams*, *supra*; and *Evans v. Newton*, *supra*.] If we were dealing with the exercise by Metropolitan of some power delegated to it by the State which is traditionally associated with sovereignty, such as eminent domain, our case would be quite a different one." 419 U.S. at 352-353. Here, as demonstrated in the next section of this Argument, we are dealing with a power that is traditionally the exclusive prerogative of the State – the power to determine disciplinary conditions for State employees – which the State has delegated to the NCAA by contract.

action extends beyond state actors to acts "done under state authority." 109 U.S. at 17.[26] Thus, in subsequent cases, this Court has not hesitated to extend state action to private parties exercising state authority, i.e., what have come to be called "powers that are 'traditionally the exclusive prerogative of the State.'" *Blum v. Yaretsky*, *supra*, 457 U.S. at 1005.[27]

For example, in *Evans v. Newton*, *supra*, a city resigned as trustee of a park that had been devised to the city in trust

---

[26] Four years earlier, in *Ex Parte State of Virginia*, 100 U.S. 339 (1879) this Court had emphasized that the prohibitions of the Fourteenth Amendment apply to actions of the State, "by whatever instruments or in whatever modes that action may be taken." Thus, "no agency of the state, or of the officers or agents by whom its powers are exerted," may violate the Amendment; as such a person "acts in the name and for the State, and is clothed with the State's power, his act is that of the State. This must be so, or the constitutional prohibition has no meaning. Then the State has clothed one of its agents with power to annul or to evade it." 100 U.S. at 346-347.

[27] The Brief for the Petitioner confuses this question by referring to the "performance by a private party of vital and comprehensive governmental *functions*," P. Br. 21 (emphasis added), and thereafter referencing a "public function test." P. Br. 22, 35-41. *See Lugar v. Edmondson Oil Co., Inc.*, *supra*, 457 U.S. at 939. Performance of a "public function" can indeed constitute state action, *Marsh v. State of Alabama*, 326 U.S. 501 (1946); *cf. Rendell-Baker v. Kohn*, *supra*, 457 U.S. at 842, but that is a wholly *different* question than whether a private party exercises a *power* that is traditionally the exclusive prerogative of the State. Much of the confusion in this regard is attributable to overlapping but hardly identical meanings given to a continuum of terms, from a "governmental power," to a "governmental function," to a "public function," to a "function affected with a public interest." *See Jackson v. Metropolitan Edison Company*, *supra*, 419 U.S. at 352-354 (1974). The NCAA is a state actor because, *inter alia*, the NCAA exercises a power that is traditionally the exclusive prerogative of the state – the power to determine disciplinary conditions for state employees. Respondent does not rely on the NCAA's performance of a "public function" here.

under a private will requiring segregation, to allow private trustees to be appointed to maintain the park on a segregated basis. This Court recognized that:

> Conduct that is formally 'private' may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action. . . . That is to say, *when private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations.*

382 U.S. at 299 (emphasis added). The Court then assumed *arguendo* that if a private party "in no way implicated the State in the supervision, control, or management" of a school or center, no constitutional question would be presented, but held that: "If the municipality remains entwined in the management or control of the park, it remains subject to the restraint of the Fourteenth Amendment . . . ". 382 U.S. at 300-301.[28]

Here, there can be no serious question that the power to hire, fire and suspend state employees from their duties is a power that is traditionally the exclusive prerogative of the State. See Nev. Rev. Stat. § 281.370(1); Nev. Rev. Stat.

---

[28] In *Evans v. Newton*, *supra*, this Court also suggested that the park performed a public function. 382 U.S. at 301-302. However, in *Evans v. Abney*, 396 U.S. 435 (1970), this court rejected Fourteenth Amendment challenges to the state court's subsequent determination that, because the park could not be maintained on a segregated basis, the land reverted to the heirs of the testator. Since allowing such a reversion would be inconsistent with the park's performance of a public function giving rise to state action, this Court thereby demonstrated that its state action holding in *Evans v. Newton*, *supra*, rested not on performance of a public function, but on the private trustees' exercise of municipal powers over what was city property before the reversion. *See Flagg Bros., Inc. v. Brooks*, *supra*, 436 U.S. at 159 n.8 (1978).

§ 396.320(1).[29] *Board of Regents v. Oakley*, 97 Nev. 605, 637 P.2d ~~H~~99 (1981); *State v. Board of Regents*, 70 Nev. 144, 261 P.2d 515 (1953).

The NCAA Constitution reaffirms the principle of institutional control of, and responsibility for, intercollegiate athletics, but in the same breath mandates that such control and responsibility be exercised in conformity with the Constitution and Bylaws of the NCAA. J.A. 79. The NCAA Constitution then obligates member institutions to "apply and enforce" NCAA "legislation" under threat of imposing penalties upon the institution if it does not do so. J.A. 80. The NCAA Bylaws obligate member institutions to comply with the NCAA enforcement program, J.A. 93-94, and the NCAA Enforcement Program expressly provides that: "The enforcement procedures are an essential part of the intercollegiate athletic program of each member institution . . . ." J.A. 97. Furthermore, as the court below noted, the factual scenario in *Regents of University of Minnesota v. NCAA*, *supra*, confirms that the NCAA does not allow any individual institution to retain either interpretive or enforcement authority over NCAA legislation. 560 F.2d at 360; J.A. 12.

Thus, as to state employees connected with intercollegiate athletics, the NCAA requires that its standards, procedures and determinations *become* the State's standards,

---

29 Nev. Rev. Stats. § 281.370(1) provides, and at all times material hereto has provided in substance, that: "All personnel actions taken by state, county or municipal departments, agencies, boards or appointing officers thereof must be based solely on merit and fitness." Nev. Rev. Stats. § 396.320(1) provides, and at all times material hereto has provided, that: "The willful neglect or failure on the part of any teacher, instructor, professor, president or chancellor in the University of Nevada System to observe and carry out the requirements of this chapter [Chapter 396, University of Nevada System, of the Nevada Revised Statutes] shall be sufficient cause for the dismissal or removal of such person from his position."

procedures and determinations for disciplining state employees. If a state university fails to accede to NCAA standards, procedures and determinations – regardless of the State's own factual determinations with respect to the state employee's conduct – the state university is subject to sanctions, including effectively barring it from participating in intercollegiate athletics. *See, e.g., Regents of University of Minnesota v. NCAA, supra.* Quite clearly, this relationship entails conduct on the part of the NCAA that goes far beyond mere advocacy by the NCAA. The State is *obligated* to impose NCAA standards, procedures and determinations making the NCAA a joint participant in the State's suspension of Tarkanian.[30]

The reach of the state action doctrine under these circumstances is well-illustrated by the so-called "White Primary Cases," culminating in *Terry v. Adams, supra.* In *Nixon v. Herndon*, 273 U.S. 536 (1927), this Court invalidated a Texas statute prohibiting blacks from participating in Democratic party primary elections. In *Nixon v. Condon, supra*, this Court then considered a subsequent Texas statute empowering the executive committee of each political party to determine those qualified to vote or otherwise participate in the party primary elections, and concluded that the statute had the effect of making the private party's executive committee an

---

30 Thus, the NCAA's claim, citing *Lugar*, that it is not a state actor because Tarkanian's suspension was not "caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible," 457 U.S. at 937, must fail. Tarkanian's suspension was "caused by the exercise of a right or privilege created by the State" because the State delegated to the NCAA its right and privilege to determine disciplinary conditions for state employees, and Tarkanian's suspension was caused "by a rule of conduct imposed by the State or by a person for whom the State is responsible," because the State suspended Tarkanian at the direction of the NCAA to fulfill the State's contractual obligations to the NCAA.

organ of the state and thereby subject to the Fourteenth Amendment. 286 U.S. at 84-85, 88-89. In *Smith v. Allwright*, *supra*, this Court then invalidated a resolution of the Texas Democratic party, limiting its membership and participation in its affairs to white citizens, recognizing that "state delegation to a party of the power to fix the qualifications of primary elections is delegation of a state function that may make the party's action the action of the state." 321 U.S. at 660, 663-665.[31]

Finally, in *Terry v. Adams*, *supra*, white Texas Democrats had formed the Jaybird Democratic Association, "a self-governing voluntary club." 345 U.S. at 463. The Association held "pre-primary elections" prior to the state primary elections; successful Jaybird candidates then entered the state Democratic primaries and "with few exceptions" ran and won without opposition in the primary and general elections. 345 U.S. at 463, 483. The Jaybird Association argued there, as the NCAA argues here, that it was a "mere private group." 345 U.S. at 466, 479. This Court (in multiple opinions) saw through the formal relationship, emphasizing that the Democratic primary and general elections were "no more than the perfunctory ratifiers of the choice that has already been made in Jaybird elections from which Negroes have been excluded." 345 U.S. at 469, *accord* 483-484. It was "immaterial that the state does not control that part of this elective process which it leaves for the Jaybirds to manage," because

---

31 *Smith v. Allwright supra*, relies on the Court's decision in *United States v. Classic*, 313 U.S. 299 (1941) where, in discussing 18 U.S.C. § 242 (then 18 U.S.C. § 52) the criminal counterpart of 42 U.S.C. § 1983, this Court observed that: "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law." 313 U.S. at 326.

the Jaybird primary had "become an integral part, indeed the only effective part, of the elective process that determines who shall rule and govern in the county." 345 U.S. at 469, *accord* 481-484.[32]

The so-called White Primary Cases establish that state delegation of statutory powers and responsibilities to private parties does not insulate those private parties from Constitutional requirements, including the Fourteenth Amendment, where the effect is a denial of constitutionally protected rights. *Terry v. Adams*, *supra*, is particularly instructive since it involved a two-tiered decision-making process such as advanced here by the NCAA as insulating the "private" party from Fourteenth Amendment requirements. Indeed, this case is significantly stronger than *Terry v. Adams*, *supra*, since there, the Democratic primary and general election results simply followed in fact the Jaybird Association election results; here, the state university is *obligated* by contract to apply and enforce the NCAA's decisions with respect to disciplining state employees.

The NCAA repeatedly relies on *Moose Lodge No. 107 v. Irvis*, *supra*. P. Br. 23, 28, 48. There, this Court refused to find state action based on the State's granting of a liquor

---

32 In the White Primary Cases, the Texas Democratic party had argued that its rules and regulations merely determined the conditions of membership in a voluntary association. *See, e.g., Smith v. Allwright*, *supra*, 321 U.S. at 657. The NCAA makes the same argument here, claiming that it did no more than determine the conditions under which UNLV could be a member in good standing of the NCAA. P. Br. 18-19, 39-41. That argument must fail here for the same reason it failed in the White Primary Cases. At the NCAA's insistence, the State has delegated its power to determine disciplinary conditions for state employees to the NCAA; under *these* circumstances, the private entity is not simply determining the conditions of membership in a private association, the private entity is a joint participant in state action disciplining the state employee. *Terry v. Adams*, *supra*.

license to a private club practicing racial discrimination because, with one exception, the State's regulations did not "in any way foster or encourage racial discrimination," or "make the State in any realistic sense a partner or even a joint venturer in the club's enterprise." 407 U.S. at 171-177. However, in doing so, this Court (per Justice Rehnquist) observed that:

> Our cases make clear that the impetus for the forbidden discrimination need not originate with the State if it is state action that enforces privately originated discrimination. Shelley v. Kraemer, *supra*. . . . Our holdings indicate that where the impetus for the discrimination is private, the State must have 'significantly involved itself with invidious discriminations,' Reitman v. Mulkey, 387 U.S. 369, 380 . . . (1967), in order for the discriminatory action to fall within the ambit of the constitutional prohibition.

407 U.S. at 172-173.

This Court then considered a state regulation obligating the club licensee to adhere to all of the provisions of its constitution and bylaws, where the private club's constitution and bylaws discriminated on the basis of race. 407 U.S. at 177-179. The Court observed that:

> Even though the Liquor Control Board regulation in question is neutral in its terms, the result of its application in a case where the constitution and bylaws of a club required racial discrimination would be to invoke the sanctions of the State to enforce a concededly discriminatory private rule. . . . Shelley v. Kraemer, 334 U.S. 1 . . . (1948), makes it clear that the application of state sanctions to enforce such a rule would violate the Fourteenth Amendment.

407 U.S. at 178-179.

Here, the State has statutory and common law power and responsibility for disciplining state employees. However, by joining the NCAA, UNLV agreed to exercise that power and responsibility according to standards, procedures and determinations dictated by the NCAA. That contractual undertaking may be neutral on its face, but under the circumstances of

this case, it results in UNLV imposing upon Tarkanian the NCAA's standards, procedures and determinations depriving Tarkanian of his Fourteenth Amendment rights to due process of law. *Cf. Brotherhood of Railroad Trainmen v. Howard*, 343 U.S. 768 (1952); *Steele v. Louisville & N.R. Co.*, 323 U.S. 192 (1944). Unquestionably, the State has "significantly involved itself" in the NCAA's deprivation of Tarkanian's Fourteenth Amendment rights by delegating its power to determine disciplinary conditions for state employees to the NCAA, making the NCAA's standards, procedures and determinations its own at the NCAA's insistence, and then imposing those standards, procedures and determinations upon a state employee because of its contractual obligation to the NCAA to do so. UNLV and the NCAA are thus joint participants in the state action suspending Tarkanian.[33]

The NCAA also relies on *Polk County v. Dodson*, 454 U.S. 312 (1981) holding that a public defender representing a criminal defendant does not act under color of state law, for

---

[33] The NCAA relies on this court's comment in *Blum v. Yaretsky*, *supra*, that merely because "the State responds" to private actions "does not render it *responsible* for those actions." 457 U.S. at 1005 (emphasis in original). P. Br. 19, 28-30, 33, 41, 46-47. There, however, the plaintiffs did not challenge the State's "response," *only* the private parties' initial actions as impairing constitutional rights. *Id.* Here, the State's "response" is at issue, and that response is dictated by the NCAA. Furthermore, the State *must* so respond because of its preexisting contractual obligations to the NCAA. Indeed, the NCAA's action/reaction scenario is cogently refuted by the NCAA's 1978 "amicus curiae" brief filed in the court below, where the NCAA successfully argued that it was "an indispensable party" on the question of the State's right to suspend Tarkanian because of its contractual rights and because the lower court's injunction had "the effect of invalidating NCAA proceedings and preventing their enforcement." NCAA Amicus Curiae Brief, pg. 19; NSCR II, 538. Quite clearly, when it is in the NCAA's interest to do so, the NCAA freely abandons its present posture that it is only concerned with the conditions of UNLV's membership in the NCAA, not UNLV's reaction to NCAA directives, and vigorously advances the NCAA's joint participation in the State's suspension of Tarkanian as a legal right entitled to judicial protection.

the notion that challenged conduct emanating from private rules rather than state law is not state action. P. Br. 25-27. But in *Moose Lodge*, the challenged conduct similarly emanated from the club's "private" constitution and bylaws. Consequently, *Dodson* does not rest solely on the canons governing the public defender's conduct being from a supposedly private source; equally important was the unique fact that a public defender representing a criminal defendant acts *adverse* to the state, and thus could not be acting under color of state law. 454 U.S. at 318-320.[34] The NCAA can make no such claim of adversity here, and the Court expressly limited its holding in *Dodson*, deciding "only that a public defender does not act under color of state law when performing a lawyer's traditional functions as counsel to a defendant in a criminal proceeding." 454 U.S. at 325 (footnote omitted).

Furthermore, *Dodson*, expressly recognizes that its holding does *not* mean that a public defender never acts under color of state law, citing *Branti v. Finkel*, 445 U.S. 507 (1980). 454 U.S. at 325-326. In *Branti* – as recognized in *Dodson* – this Court held that public defenders do so act in making hiring and firing decisions for the State, and that such decisions are subject to the First and Fourteenth Amendments. Here it is *not* Tarkanian's performance on the basketball court, but his suspension from his duties as a state employee that is at issue. Since the NCAA requires that the State delegate its power to determine disciplinary conditions for state employees to the NCAA, and then utilizes the State's power to discipline state employees in requiring that state employees like Tarkanian be suspended, the NCAA has made

---

[34] In fact, the Court's comments with respect to public defenders being governed by the same standards as private attorneys were made in response to the argument that public defenders differ from private attorneys by being employed and paid by the State and thus having different loyalties to their clients. 454 U.S. at 321-324. These concerns simply are not present here.

itself a joint participant in the State's suspension of Tarkanian, regardless of whether or not the NCAA is a state actor in other contexts or for other purposes.

Thus, the NCAA's reliance on *Lugar* in arguing it is not a state actor because it is a private "voluntary" association applying "its own law," i.e., its own "private" rules and regulations in requiring that UNLV, a State university, suspend Tarkanian, a State employee, simply cannot prevail.[35] This Court has long recognized that a private party's joint participation with the State in state action makes the private party a state actor. *Dennis v. Sparks*, *supra*; *Adickes v. S.H. Kress and Co.*, *supra*. Here, at the NCAA's insistence, the State has delegated its statutory powers and responsibilities with respect to disciplining state employees to the NCAA and installed the NCAA's standards as the State's standards on that issue. *Cf. Evans v. Newton*, *supra*; *Smith v. Allwright*, *supra*; *Nixon v. Condon*, *supra*. Furthermore, the State has then imposed the standards, procedures and determinations dictated by the NCAA under the State's statutory and common law authority over state employees, because of the State's contractual obligation to the NCAA to do so. *Cf.*, *Moose Lodge No. 107 v. Irvis*, *supra*, 407 U.S. at 177-179 (1972); *Terry v. Adams*, *supra*. This joint participation of the NCAA and the State in suspending Tarkanian makes the NCAA a state actor.

---

[35] The suspension of Tarkanian clearly satisfies the first test set forth in *Lugar*, "whether the claimed deprivation has resulted from the exercise of a right or privilege having its source in state authority," 457 U.S. at 939, since the deprivation can be "ascribed to [a] governmental decision" and "the authority of state officials . . . put the weight of the State behind [the NCAA's] private decision. . . ." 457 U.S. at 940. As discussed throughout this brief, the suspension of Tarkanian also satisfies the second test in *Lugar*, "whether, under the facts of this case, . . . private parties may be appropriately characterized as 'state actors,' " 457 U.S. at 939, because this Court has "consistently held that a private party's joint participation with state officials . . . is sufficient to characterize that party as a 'state actor' for purposes of the Fourteenth Amendment." 457 U.S. at 941.

III. THE NCAA AND THE STATE WERE JOINT PARTICIPANTS IN SUSPENDING TARKANIAN BECAUSE OF THE INTERDEPENDENCE AND SYMBIOTIC RELATIONSHIP BETWEEN UNLV AND THE NCAA WITH RESPECT TO SUSPENDING TARKANIAN WITHOUT DUE PROCESS OF LAW.

In *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), a public parking garage had leased space to a private restaurant that discriminated on the basis of race. This Court concluded that this leasing "constituted a physically and financially integral and, indeed, indispensable part of the State's plan to operate its project as a self-sustaining unit." 365 U.S. at 718-719, 723-724. Conversely, the restaurant enjoyed the benefits of the garage's property tax exemption and the State's agreement to furnish utilities and make structural and exterior repairs. 365 U.S. at 719-720. The garage provided a convenient place for patrons of the restaurant to park – perhaps increasing the demand for the parking facilities – and the restaurant claimed that serving blacks would injure its business, meaning that "profits earned by discrimination not only contribute to, but also are indispensable elements in, the financial success of a governmental agency." 365 U.S. at 724.

This Court held that:

> The State has so far insinuated itself into a position of interdependence with [the private restaurant] that it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered to have been so 'purely private' as to fall without the scope of the Fourteenth Amendment.

365 U.S. at 725. Subsequent decisions have reaffirmed this holding, characterizing the requisite interdependence as a "symbiotic relationship," but found no state action because either or both of the parties were not in fact sufficiently dependent on the other to create the requisite symbiotic relationship. *See Blum v. Yaretsky*, *supra*, 457 U.S. at 1010-1011; *Rendell-Baker v. Kohn*, *supra*, 457 U.S. at

842-843; *Jackson v. Metropolitan Edison Company*, *supra*, 419 U.S. at 357-358; *Moose Lodge No. 107 v. Irvis*, *supra*, 407 U.S. at 174-177.

In *San Francisco Arts & Athletics v. Olympic Committee*, *supra*, this Court held that the United States Olympic Committee ("USOC") was not a governmental actor so as to make its suit to restrain use of the term "Olympic," under a Federal statute giving the USOC exclusive use of that term, subject to the limitations of the Fifth Amendment. 107 S. Ct. at 2984-2987.[36] However, four Justices of this Court would have found the requisite joint participation or nexus under the principles enunciated in *Burton*. 107 S. Ct. at 2987, 2991-2993.[37]

Admittedly, as this Court's decisions reflect, it is truly a rare case that presents the requisite interdependence or symbiotic relationship, but this is such a case. UNLV is wholly dependent upon the NCAA for its ability to engage in major intercollegiate athletics, and that dependence is directly related to Tarkanian's suspension; if UNLV does not impose the sanctions required by the NCAA against Tarkanian, UNLV risks additional sanctions from the NCAA, including being barred from engaging in major intercollegiate athletics.

---

[36] This Court expressly refused to consider whether the USOC's obtaining of an injunction from the District Court constituted governmental action under *Shelley v. Kraemer*, *supra*, because it was not fairly encompassed within the questions presented in the petition for certiorari. 107 S. Ct. at 2987 n.30.

[37] The NCAA relies on this Court's observation in the *Olympic Committee* case that: "Neither the conduct nor the coordination of amateur sports has been a traditional governmental function." 107 S. Ct. at 2985; P. Br. 37. However, as the NCAA recognizes, that comment properly relates to the "public function" question (P. Br. 37), and respondent is not relying on the NCAA's performance of a "public function" here. This Court has already refused to tolerate Fourteenth Amendment violations resulting from the joint action of the State and private parties granted exclusive control of municipal recreational facilities for school athletic contests. *Gilmore v. City of Montgomery*, 417 U.S. 556 (1974).

J.A. 103-104, 180-183. Conversely, the NCAA is entirely dependent upon its member institutions, including state universities like UNLV, to implement and enforce its standards and determinations with respect to intercollegiate athletics. J.A. 104-107. And, once again, this dependence is directly related to the state action in question here; the NCAA has required that UNLV suspend Tarkanian, UNLV has acquiesced, and it is UNLV's suspension of Tarkanian that has been enjoined by the courts below.

Thus, this case presents a classic example of the interdependence or symbiotic relationship found decisive in *Burton*. UNLV is dependent upon the NCAA and must impose the NCAA's directives with respect to Tarkanian or risk being unable to participate in intercollegiate athletics. The NCAA is dependent upon UNLV, and must look to UNLV to impose its directives against Tarkanian, or risk being unable to implement and enforce its standards, determinations and chosen penalties against State employees connected with intercollegiate athletics. As to the matters in question here, this interdependence is complete and an integral part of the challenged action. Consequently, this interdependence, or symbiotic relationship, makes the NCAA and UNLV joint participants in the state action suspending Tarkanian. *Burton v. Wilmington Parking Authority*, *supra*.

The NCAA relies on this Court's comments in *NCAA v. Board of Regents of University of Oklahoma*, 468 U.S. 85 (1984), noting that the NCAA "plays a critical role in the maintenance of a revered tradition of amateurism in college sports" and "needs ample latitude to play that role . . . ." 468 U.S. at 120; P. Br. 31 n.11. There, however, this Court recognized that this "ample latitude" did *not* include exclusive control over the televising of intercollegiate athletic events, because it is "well settled that good motives will not validate an otherwise anticompetitive practice." 468 U.S. at 101 n.23.

The same is true with respect to Fourteenth Amendment violations. *See, e.g., Cooper v. Aaron*, 358 U.S. 1 (1958). *No one* questions the purposes and goals of the NCAA. As amply confirmed by the evidence and judgment below, however, the NCAA's methods are quite a different matter.

The NCAA has demanded a decisive, rather than an advisory role with respect to disciplining state employees connected with intercollegiate athletics. Given that choice, fundamental fairness demands that the NCAA give state employees connected with intercollegiate athletics the same due process rights as the State must give to all other state employees. Otherwise, the State would be free to simply evade its Fourteenth Amendment obligations by transferring its responsibilities to private parties like the NCAA. The question here has been the destruction of the reputation, livelihood and 30-year professional career of a prominent state employee. The importance of that question demands that Tarkanian's due process rights as a state employee not be sacrificed to the NCAA's practical ability to usurp the State's disciplinary power over state employees connected with intercollegiate athletics, because of the NCAA's exclusive control over access to, as well as the regulation of, intercollegiate athletics.

Furthermore, recognition of Tarkanian's due process rights need not impair the NCAA's "critical role in the maintenance of a revered tradition of amateurism in college sports." The NCAA's power to set standards and compel adherence to those standards, including standards requiring the severance of private parties from university athletic programs, remains unimpaired. The only difference is that if the NCAA wishes to retain the exclusive power to decide when a state employee must be suspended from his duties, as opposed to leaving that decision-making function in the hands of the State, then the NCAA must give that state employee the same

due process rights to which he would be entitled from the State. That is hardly an unfair imposition, given the NCAA's reliance on the State's power over state employees to enforce its determinations against state employees; it is simply the same obligation imposed on the State itself by the Fourteenth Amendment.[38]

CONCLUSION

The relationship between the NCAA and state universities like UNLV presents a rare and perhaps unique relationship between private parties and the State.

First, the NCAA contractually requires that UNLV abide by NCAA disciplinary decisions concerning persons connected with intercollegiate athletics, but looks solely to UNLV to enforce its disciplinary decisions against state employees like Tarkanian. Second, UNLV not only has delegated its state power and authority to determine disciplinary conditions for state employees to the NCAA, but also has contractually agreed to impose the NCAA's disciplinary determinations against state employees connected with intercollegiate athletics, because UNLV could not do otherwise and engage in intercollegiate athletics. Third, the result of this interdependence is a classic symbiotic relationship in which each party is wholly dependent upon the other in disciplining state employees like Tarkanian.

---

[38] Holding that the NCAA is a state actor will not subject to § 1983 liability other private parties – concerned citizens, media, consultants – who also seek to influence state decisions. These private parties do not seek to compel state officials to render decisions without due process and they differ from the NCAA in the degree of influence they exercise over state decisionmaking and in the degree of authority contractually delegated to them by the state.

Each of these factors, separately as well as in combination, makes the NCAA a joint participant in UNLV's suspension of Tarkanian and thus a state actor. The judgment below should be affirmed.[39]

Respectfully submitted,

SAMUEL S. LIONEL, ESQ.
(Counsel of Record)
DAVID N. FREDERICK, ESQ.
MARK A. SOLOMON, ESQ.
MARC H. RUBINSTEIN, ESQ.
LIONEL SAWYER & COLLINS
1700 Valley Bank Plaza
300 South Fourth Street
Las Vegas, Nevada 89101
(702) 383-8888

Attorneys for Respondent

---

[39] The NCAA's demand in the Conclusion to its brief (P. Br. 48) that the "judgment should be reversed, and the injunctions should be dissolved" cannot be granted in any case. UNLV did not appeal the injunction entered against it to the Nevada Supreme Court and as a result, the injunction prohibiting UNLV from suspending Tarkanian is final and not subject to review here. *Heath v. State of Alabama*, 474 U.S. 82, 106 S. Ct. 433, 436-437 (1985); *Marsh v. State of Alabama*, 463 U.S. 783, 785 n.3 (1983); *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 671 n.2 (1976); *cf. Federated Dept. Stores, Inc. v. Moitie*, 452 U.S. 394 (1981); *Ackermann v. United States*, 340 U.S. 193 (1950).

ADDENDUM

ADDENDUM

LIST OF EXHIBITS CITED AND VOLUME AND PAGE OF RECORD ON APPEAL ("ROA") WHERE THEY WERE OFFERED AND ADMITTED INTO EVIDENCE.

EXHIBITS	OFFERED	ADMITTED
EX. 1	VIII, 1875	VIII, 1875
EX. 2	VIII, 2146	VIII, 2147
EX. 3	IX, 2331	IX 2332
EX. 8	IX, 2378	IX, 2379
EX. 11	VIII, 1880	VIII, 1881
EX. 12	VIII 1882	VIII, 1882
EX. 14	IX, 2318	IX, 2321
EX. 16	VIII, 1896	VIII, 1897
EX. 17	VIII, 1897	VIII, 1897
EX. 19	VIII, 1898	VIII, 1899
EX. 20	VIII, 1893	VIII, 1893
EX. 22	VIII, 2074	VIII, 2075
EX. 24	VIII, 1876	VIII, 1876
EX. 26	IX, 2375	IX, 2375
EX. 27	VIII, 1901	VIII, 1902
EX. 28	VIII, 2131-32	VIII, 2132
EX. 31 (a) (b) (c)	VIII, 2095	VIII, 2099
EX. D	VIII, 1928	VIII, 1928
EX. E	X, 2666	X, 2666